In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 306

ROCHESTER GAS & ELECTRIC CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. 1a-12a) is reported at 344 F. 2d 594. The opinions of the Federal Power Commission (Pet. App. 13a-23a) are reported at 32 FPC 48 and 668.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1965. The petition for a writ of certiorari

was filed on June 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether evidence of past use of a river segment for transportation in interstate commerce is sufficient to sustain a finding that it constitutes "navigable waters" within the meaning of the Federal Power Act.

STATUTE INVOLVED

Sections 3(8), 23(b) and 313(b) of the Federal Power Act (16 U.S.C. §§ 796(8), 817, and 825*l*(b)) are set forth in the appendix to the petition.

STATEMENT

The Genesee River rises in the Allegheny Plateau in Potter County, Pennsylvania, and runs northward about 158 miles, crossing New York State, and discharging into Lake Ontario. On the river, petitioner maintains four hydroelectric developments which were constructed before June 10, 1920, without any federal permit. In response to petitioner's request for a declaratory order, the Commission found that the Genesee River is a navigable water, within the purview of the Federal Power Act, at the sites of all four of petitioner's projects, and accordingly ordered petitioner to apply for a Commission license for all four. The present petition seeks review of the decision of the court below sustaining the Commission's order as to

three of the developments located at a stretch of rapids and falls in Rochester, New York.[1]

Section 3(8) of the Act defines "navigable waters" as including "interrupting falls, shallow, or rapids." Since the river is unquestionably used for navigation downstream from Rochester, petitioner concedes that, under the Act, it is "navigable" at the Rochester falls and rapids if it is "navigable" upstream from Rochester. The only contention it seeks to present to this Court is that admitted navigation upstream in the past does not warrant a finding that the river is "navigable" under the Power Act.

The Commission found that the Genesee River was navigable above the Rochester rapids and falls because it had been used for transportation of goods in the past. Thus, the petition for declaratory order disclosed that, after the Erie Canal was constructed in 1825, goods were transported down the Genesee River to just above the rapids and falls in Rochester for shipment on the Erie Canal, which there crossed the river. Also, between 1812 and 1840, flat-bottomed barges and rafts carrying potash, pearlash, lumber and wheat were transported downstream on the river to Rochester.[2] On the basis of these findings, the

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[1] As to the fourth, the court held the Commission's order unsupported and remanded the case for further proceedings. The Commission is not contesting that ruling at this time.

[2] In 1840, the Genesee Valley Canal was built from Mount Morris to Rochester, about 40 miles downstream on the River. It was later extended upstream beyond Mount Morris. Use of the Genesee Valley Canal was abandoned in 1878 with the coming of the railroads.

Second Circuit sustained the Commission's conclusion that petitioner's plants were located on navigable waters.[3]

ARGUMENT

The decision below is supported by uniform rulings in several courts of appeals and is consistent with, if not actually required by, prior decisions of this Court. There is thus no occasion for further review.

So far as here relevant, Section 3(8) of the Federal Power Act defines "navigable waters" as those which "are used or suitable for use for the transportation of persons or property." It is undisputed that the water here in question has in the past been used for the transportation of property. On the basis of this admitted fact, the Commission and the court below concluded that it is "navigable water" under the Federal Power Act. In so holding, the court below relied on this Court's unequivocal holding in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407-410, that "When once found to be navigable, a waterway remains so. * * * Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense." See also *Economy Light and Power Co.* v.

[3] The Commission had also found that "The Genesee River with reasonable improvements could again support interstate commerce" (R. 4a). The court below did not accept this alternative basis of the Commission's ultimate finding of navigability.

United States, 256 U.S. 113, 124, quoted in the Commission's order denying rehearing (R. 17a-18a).[4]

As the court below states (Pet. App. 4a-5a), "Every court which has considered the question" has treated this Court's holding and discussion in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407-410, as controlling as to the definition of "navigable waters" under the Federal Power Act. *Citizens Utilities Co.* v. *Federal Power Commission*, 279 F. 2d 1 (C.A. 2), certiorari denied, 364 U.S. 893; *Montana Power Co.* v. *Federal Power Commission*, 185 F. 2d 491 (C.A.D.C.), certiorari denied, 340 U.S. 947; *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908 (C.A. 5); *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743, 748 (C.A. 7), certiorari denied, 325 U.S. 880; *Wisconsin* v. *Federal Power Commission*, 214 F. 2d 334, 337-338 (C.A. 7), certiorari denied, 348 U.S. 883. While petitioner attempts to "distinguish" most of the cases cited (Pet. 13-16), it does not even suggest that there is any conflict among the circuits. Rather it contends that the courts "have misconstrued *Appalachian*" (Pet. 13) or have announced erroneous "dicta" (Pet. 16). But this contention is plainly without merit.

This Court has repeatedly recognized that the Federal Power Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which

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[4] "R." references are to petitioner's appendix in the court below.

would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so * * *." *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 180. Similarly, when this Court stated, only last Term, that Congress "most assuredly" exercised "its authority over navigation in the Federal Water Power Act" (*Federal Power Commission* v. *Union Electric Co.*, slip op., p. 15), it was in a context which made clear that Congress' *full* "authority over navigation" was referred to. The meaning of "navigable waters" in the Power Act is thus the same as that stated by this Court in the *Appalachian* case, which was relied upon by the court below.

Moreover, the legislative history of the Power Act clearly supports the view of the Commission and the court below that the term "navigable waters," as used in the Federal Power Act, is at least as broad as it is under the River and Harbor Act of 1899. See H. Rep. 1318, 74th Cong., 1st Sess., p. 26; S. Rep. 621, 74th Cong., 1st Sess., pp. 47; Hearings on H.R. 5423, 74th Cong., 1st Sess., p. 391. It is clear that under the River and Harbor Act the segment of river in issue would be considered navigable waters. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, 161-162 (C.A.D.C.), certiorari denied, 315 U.S. 806; cf. *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (C.A. 2), certiorari denied, 320 U.S. 792; *Wisconsin Public Service Corp.* v. *Federal Power Commission*, *supra*, 147 F. 2d 743, 749.

Finally, petitioner did not raise its present objection to the Commission's order in its application for administrative rehearing, but expressly recognized that prior decisions as to the meaning of the term "navigable waters of the United States" were controlling (R. 8a-9a). It is therefore doubtful whether petitioner can litigate this issue now.[5]

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[5] See, *e.g.*, the following decisions under Section 19(b) of the Natural Gas Act (52 Stat. 831, as amended, 15 U.S.C. 717r(b)), which is identical to Section 313(b) of the Federal Power Act (49 Stat. 860, as amended, 16 U.S.C. 825*l*(b)): *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 157-158; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649, 650-651. See *Utah Power & Light Co.* v. *Federal Power Commission*, 339 F. 2d 436 (C.A. 10), applying the rule under the Federal Power Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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